TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISSOURI CONSTITUTION

STATUTES

RULES

OTHER

JURISDICTIONAL STATEMENT

Appellants sued the City of Peculiar to seek a declaratory judgment and to enjoin the City from issuing revenue bonds without a public vote. Appellants cited, in particular, Article VI Sections 27 and 27(a) of the Missouri Constitution, contending that these sections require a public vote before revenue bonds can be issued for a power plant. The Trial Court denied the relief sought by Appellants and granted relief requested by the City. Appellants seek reversal, with remand for entry of a declaratory judgment stating that the City cannot issue the revenue bonds without a vote of the people and for an injunction.

This case involves the interpretation of Missouri Constitution Article VI, Sections 27, 27(a) and 27(b) and Article X Section 6. This case does not challenge the validity of any statute of the State, the validity of any Constitutional provision of the State, the construction of any revenue laws of the State, the title to any State office, the death penalty, or the validity of any treaty or statute of the United States. Rather, it involves the question of proper interpretation and implementation of Missouri Constitution Article VI, Sections 27, 27(a) and 27(b). No party attacked the validity of any Constitutional provisions but rather Appellants ask for the proper interpretation and application of the Constitutional provisions. The Court in its judgment ruled on all pending matters, and the Judgment is final for purposes of appeal. Legal File 35 – 36, Appendix A-1.

STATEMENT OF FACTS

The parties stipulated to the statement of facts before the case was submitted to Judge Joseph Dandurand, Circuit Court of Cass County. The stipulation of facts is set out verbatim in paragraphs 1 through 31, below:

1. The individual persons named as Plaintiffs are each landowners within Cass County, some of whom reside in Peculiar, Missouri. Legal File 24.

2. The entity named Stopaquila.org is an unincorporated association of the individual Plaintiffs, along with other persons not named as Plaintiffs, and are a fair and adequate representation of the members. Legal File 25.

3. Defendant City of Peculiar, Missouri ("City") is a fourth class city organized under the laws of the State of Missouri with its location being in Cass County, Missouri. Legal File 25.

4. The population of the City was 2,604 in the year 2000 decennial census of the United States, as published by the United States Census Bureau. Legal File 25.

5. Aquila, Inc. ("Aquila") is a corporation authorized to do business in Missouri operating as a utility and is engaged in the business of generating and selling electricity. Legal File 25.

6. Aquila owns approximately seventy four (74) acres of property generally located southwest of the intersection of East 241st Street and South Harper Road in an unincorporated portion of Cass County ("Property"), approximately two miles south of the city limits of the City. Legal File 25.

7. Aquila owns approximately fifty-five (55) acres of property generally located northwest of the City in an unincorporated portion of Cass County on which

Aquila proposes to operate an electric transmission substation facility ("Transmission Property"). Legal File 25.

8. Aquila has stated that it intends to undertake or cause to be undertaken, in one or more phases, a "Project" which consists of: (a) the construction of electric power generating facilities on the Property that will generate electricity ("Power Plant"); (b) the improvement of certain transmission lines ("Transmission Lines") that are located in unincorporated portions of Cass County and the City, through which electricity will be transmitted from the Power Plant to the Transmission Property; and (c) construction and installation of a substation transmission facility on the Transmission Property. Plaintiffs object to the use of the word "project" to the extent that it may have legal significance, but do not oppose the use of the word "project" as long as it is understood that Plaintiffs' objection is recognized. Legal File 25.

9. Aquila anticipates that the Project will cost approximately $133,000,000. Legal File 25.

10. The Project will provide electric power to Aquila's Missouri Public Service and St. Joseph Light & Power customers, including customers in the City. The Project will enhance the electric service provided to customers, including customers in the City. Legal File 25.

11. Aquila has submitted to the City a plan for the Project ("Plan") that the City believes was prepared in accordance with the requirements of Section 100.050, RSMo. Legal File 25.

12. On December 1, 2004, the City sent written notice to the Raymore-Peculiar School District, the West Peculiar Fire Protection District, Cass County, Missouri, the Cass

County Library District, the Cass County Area Workshop and the Cass Medical Center that a public meeting will be held by the City of Peculiar Board of Aldermen on December 21, 2004 to consider the Plan. Legal File 25.

13. The Board of Aldermen is expected to consider an ordinance that would approve the Plan for development of the Project following the public meeting on December 21, 2004. Legal File 26.

14. Aquila and the City are negotiating an Economic Development Agreement ("Agreement") that will define the rights, duties and obligations of the parties regarding the construction and financing of the Project and ownership and leasing of the Project, the Property, the Transmission Lines and the Transmission Property. The first reading of the ordinance was passed by the Board of Alderman on December 7, 2004, by a vote of 4 to 2. Legal File 26.

15. The Agreement will provide that, in the course of entering into one or more construction contracts to construct the Project, Aquila will obtain or shall ensure that any contractor obtains workers' compensation, comprehensive public liability and builder's risk insurance coverage in amounts customary in the industry for similar type projects and shall ensure that the insurance required is maintained by any such contractor for the duration of the construction of the Project and that the City will be named as an additional insured. Legal File 26.

16. If the Plan is approved by the Board of Aldermen, the City intends to issue revenue bonds ("Revenue Bonds"), as defined in Article VI, Section 27(c) of the Missouri Constitution, in a principal aggregate amount not to exceed $140,000,000 to finance the

costs of the Project, without a vote of the electors residing in the City of Peculiar. Legal File 26.

17. The City will not issue the Revenue Bonds until the Plan is approved by a majority vote of the Board of Aldermen of the City. Legal File 26.

18. The City has stated that it will issue the Revenue Bonds by a majority vote of the Board of Aldermen pursuant to Article VI, Section 27(b) of the Missouri Constitution and Sections 100.010 to 100.200 of the Revised Statutes of Missouri, and the proceeds of the Revenue Bonds will be used to finance or refinance the costs of the Project. Plaintiffs dispute the City's contention that Article VI Section 27(b) applies. Legal File 26.

19. The City anticipates that the maximum term of the Revenue Bonds will be thirty (30) years after the date that the Project becomes operational. Legal File 27.

20. When the Revenue Bonds are issued by the City, the City will execute a trust indenture with a trustee ("Trust Indenture") to administer the distribution of proceeds generated by the Revenue Bonds. The City will grant a deed of trust to encumber the Project, except the Transmission Lines, as security for the Revenue Bonds and payments in lieu of taxes ("PILOTs") to be made to the City by Aquila under the Trust Indenture and the Agreement. Legal File 27.

21. Upon issuance of the Revenue Bonds, Aquila intends to convey legal title to the Power Plant, the Property and the Transmission Property to the City, but excluding the Transmission Lines, to be purchased by the City using the proceeds of the Revenue Bonds. Legal File 27.

22. After the City accepts title, the City intends to lease the Power Plant, the Property and the Transmission Property to Aquila for a term to coincide with the term of the Revenue Bonds, all in accordance with a lease-purchase agreement ("Lease") that will be executed by Aquila and the City. Upon execution of the Lease, Aquila will make lease payments in amounts identical to the debt service on the Revenue Bonds, will be responsible to control the construction of the Project, will be responsible to operate, insure and maintain the Project, will be responsible to bill customers using electricity from the Project, will indemnify the City for costs and expenses related to the Project, and upon payment of the Revenue Bonds will have the option or be required to purchase the Project for the nominal amount of $1,000. The City will hold legal title to the Power Plant, the Property and the Transmission Property, but not the Transmission Lines. The City will not include any of the Project as an asset for financial reporting purposes. Aquila will include the Project as an asset for its financial reporting purposes, including the revenues, expenses and depreciation for financial reporting purposes and federal and state income tax purposes. Legal File 27.

23. The Lease will contain an option granted to Aquila to purchase the Project at any time upon payment of the Revenue Bonds (or tendering the Revenue Bonds in payment) plus the nominal amount of $1,000. Upon final payment of the Revenue Bonds, Aquila is required to purchase the Project for the nominal amount of $1,000. The City will not expend any of its own funds to acquire or construct the Project and to the extent the proceeds of the Revenue Bonds are not sufficient for such purposes, Aquila will expend funds to complete the Project. Legal File 28.

24. The Agreement will provide that, so long as the City holds legal title to all or any portion of the Project, the City must approve any use or additional development of the Property and the Transmission Property other than for the Project. Legal File 28.

25. The principal and interest due on the Revenue Bonds will be secured and repaid solely by the lease payments pursuant to the Lease. The City and Aquila take the position that the City will have no obligation or liability to make payments with respect to the Revenue Bonds or the Project except from payments made under the Lease, from the proceeds of the Revenue Bonds or from funds provided by Aquila. Legal File 28.

26. The City takes the position that, as a result of the Revenue Bonds and the Lease arrangement, the Project, except the Transmission Lines, will be exempt from property taxes, whether real, personal or otherwise, levied by any applicable taxing authority, including, without limitation, the City, Cass County, the West Peculiar Fire Protection District, the Cass County Library District and the Raymore Peculiar R-II School District, for as long as the City holds legal title to the Project. Legal File 28.

27. The City anticipates that the total amount of property taxes that would be payable by Aquila from the addition of the Project to all taxing jurisdictions if the Revenue Bonds were not issued is approximately $25,000,000, with the local taxing districts receiving approximately $1,600,000 of this total, during the next 30 years. The City anticipates that, in lieu of the exempt property taxes relating to the Project, Aquila will make PILOTs to the City, which the City will divide among the applicable taxing jurisdictions in proportion to the amount of the then current ad valorem tax levy of each taxing jurisdiction that includes the Property. The amount of each annual PILOT to the City is approximately $241,800 from 2005 through 2032, and a lower PILOT will be made

to the City in 2033 through 2035. The net result of the PILOTs is to increase the amount of revenues to the local taxing jurisdictions in Cass County, Missouri from approximately $1,600,000 to approximately $7,300,000, with the Raymore-Peculiar School District being the largest recipient of the PILOTs in an approximate amount of $5,000,000, during the term of the Revenue Bonds. If you look at the amounts (including PILOTs and tax payments) that Aquila would be expected to pay all the taxing authorities throughout the state during the above time frame if the project goes through but without the bonds and the tax abatement, and compare it to the total amount that Aquila would be expected to pay (including PILOTs and tax payments) to all the taxing authorities throughout the state during that same time period if the project goes through with the bonds and the tax abatement, Aquila would save about $17,000,000 overall if the bond proposal is approved with the tax abatement. Legal File 28.

28. If the Project is expanded and financed with additional revenue bonds, Aquila will make additional PILOTs equal to $2,210 per $1 million of the additional revenue bonds issued by the City to finance the Project expansion. Legal File 29.

29. The parties agree that the people who live in the City who are eligible to vote are the "electors" as that term is used in the statutes and the Missouri Constitution for issues required to be voted in the City. Legal File 29.

30. The parties agree that this dispute is ripe for consideration by the Court. There is ample reason to believe the Board of Alderman will pass the ordinance approving the Agreement as proposed in the first reading without any significant change, and will proceed to approve the Plan and issue the Revenue Bonds without a vote. Plaintiffs and

the City urge that it is important to resolve this issue before the time that entities actually pay money for the Revenue Bonds. Legal File 30.

31. The parties stipulate that if Plaintiffs or people similarly situated in fact have the right to vote and are not permitted to vote, then there would be no adequate legal remedy, and an injunction would be needed to preserve said right and avoid civil rights damages, and that there would be irreparable harm to Plaintiffs and others similarly situated if they in fact have the right to vote and are not permitted to vote. The parties stipulate that if the City has the authority to issue said bonds without a vote of the people and the City is not permitted to do so promptly, there would be no adequate legal remedy and an injunction would needed to prevent irreparable loss to the City if in fact the City has the right to proceed without a public vote. Legal File 30. [End of stipulation of facts.]

32. The petition was filed on November 8, 2004, by Plaintiffs/Appellants. Legal File 1.

33. The Plaintiffs/Appellants are STOPAQUILA.ORG, formerly known as NEIGHBORS AGAINST THE PECULIAR ANNEXATION, an unincorporated association, Della January, Gary Crabtree, Nancy Manning, Mark Andrews, Steve Vincent and Max January, for themselves and as representatives of STOPAQUILA.ORG , formerly known as THE NEIGHBORS AGAINST PECULIAR ANNEXATION. Legal File 1.

34. The Judgment was entered on December 27, 2004. Legal File 32.

35. The Trial Court denied the Plaintiffs/Appellants' request for injunction and declaratory relief and granted the City's request for declaratory judgment, stating that the City was authorized under Article VI Section 27(b) of the Missouri Constitution to proceed

to issue the revenue bonds with only a vote of the Board of Alderman. Legal File 35. The Court in its judgment ruled on all pending matters, and the Judgment is final for purposes of appeal. Legal File 35 – 36, Appendix A-1.

36. Notice of Appeal was filed on January 19, 2005. Legal File 37.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' REQUEST FOR INJUNCTION AND DECLARATORY JUDGMENT AND GRANTING A DECLARATORY JUDGMENT IN FAVOR OF THE CITY THAT DECLARED THAT THE CITY MAY ISSUE REVENUE BONDS, BECAUSE THE JUDGMENT ERRONEOUSLY DECLARED THE LAW AND THE JUDGMENT IS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE MISSOURI CONSTITUTION, ARTICLE VI SECTION 27 (OR IN THE ALTERNATIVE 27[A]) AND RSMO 88.770 APPLY TO THIS CASE AND REQUIRE THAT FOR THE CITY TO ISSUE REVENUE BONDS FOR THE CONSTRUCTION OF A POWER PLANT OR A PLANT TO BE LEASED THERE MUST BE A VOTE OF THE ELECTORS, AND NO SUCH VOTE WAS HELD.

Mo. Constitution Article VI Section 27

Mo. Constitution Article VI Section 27(a)

RSMO 88.770

POINT II.

THE TRIAL COURT ERRED IN ISSUING A FINDING THAT DECLARED THAT THE PROJECT WAS FREE FROM TAXATION BY THE COUNTY AND BY OTHER TAXING AUTHORITIES BECAUSE THE FINDING ERRONEOUSLY DECLARED THE LAW, IN THAT AQUILA IS TO HAVE A LEASEHOLD INTEREST IN THE PROPERTY AND SUCH IS NOT EXEMPT FROM TAXATION, AND IN THAT NO PARTY ASKED FOR THIS IN ITS PRAYER, AND IN THAT THE OTHER TAXING AUTHORITIES WERE NOT PARTIES TO THIS LITIGATION AND CANNOT BE BOUND BY THIS JUDGMENT.

Iron County v. State Tax Commission, 437 S.W.2d 665 (Mo banc 1968)

St. Charles County v. Curators of the U.M., 25 S.W.3d 159 (Mo.banc 2000)

LEGAL ARGUMENT

I.

THE TRIAL COURT ERRED IN DENYING APPELLANTS' REQUEST FOR INJUNCTION AND DECLARATORY JUDGMENT AND GRANTING A DECLARATORY JUDGMENT IN FAVOR OF THE CITY THAT DECLARED THAT THE CITY MAY ISSUE REVENUE BONDS, BECAUSE THE JUDGMENT ERRONEOUSLY DECLARED THE LAW AND THE JUDGMENT IS AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THE MISSOURI CONSTITUTION,

ARTICLE VI SECTION 27 (OR IN THE ALTERNATIVE 27[A]) AND RSMO 88.770 APPLY TO THIS CASE AND REQUIRE THAT FOR THE CITY TO ISSUE REVENUE BONDS FOR THE CONSTRUCTION OF A POWER PLANT OR A PLANT TO BE LEASED THERE MUST BE A VOTE OF THE ELECTORS AND NO SUCH VOTE WAS HELD.

A. STANDARD OF REVIEW.

This matter was submitted to the Circuit Court on a stipulation of facts. No witnesses were presented. Accordingly, there was no opportunity of the Trial Court to view the witnesses, and such is not a consideration on appeal.

The applicable standard of review is that set out in Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976):

> [A]ppellate "review * * * as in suits of an equitable nature," as found in Rule 73.01, is construed to mean that the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.

Appellants in point I assert that the decision of the Trial Court erroneously declared the law, erroneously applied the law, and/or the decision was against the weight of the evidence.

B. THE CONSTITUTIONAL PROVISIONS THAT PERTAIN TO POWER PLANTS EVIDENCE A GENERAL POLICY THAT THERE MUST BE

A PUBLIC VOTE FOR ISSUANCE OF BONDS RELATING TO POWER PLANTS.

C. THE CONSTITUTIONAL PROVISIONS THAT PERTAIN TO POWER PLANTS REQUIRE A VOTE OF THE PUBLIC FOR REVENUE BONDS TO BE ISSUED.

The Mayor and the Board of Alderman of Peculiar seek to issue and sell approximately one hundred and forty million dollars ($140,000,000) in "revenue bonds" to finance the construction of a power plant. The City's agreement with Aquila provides that Aquila will lease the property from the City and will operate the power plant, and will have the right to acquire the facilities by paying off the bonds and paying a nominal sum of $1,000. Legal File 28 at paragraph 23. The agreement with Aquila also purports to assert that the project will be free from property taxes, resulting in overall net tax savings for Aquila of about seventeen million dollars ($17,000,000). Legal File 29. The site is about two miles outside of the City limits. Legal File 25 at paragraph 6.

Appellants ("StopAquila.Org") urge that Article VI, Sections 27 is directly on point and requires a vote of the electors (the people who live in the City of Peculiar and are eligible to vote). As an alternative, Appellants urge that Article VI Section 27(a) is on point and requires a vote of the electors.

The Trial Court rejected the application of Sections 27 and 27(a) and declared instead that Section 27(b) controls. Legal File 35, Appendix A-4. The Trial Court's Judgment denies the request of Appellants for an injunction and declaratory relief and declares as its Judgment that the City of Peculiar may issue revenue bonds for the

construction of the power plant with only a vote of the Alderman and without a vote of the public. Legal File 35, Appendix A-4. The Court erred.

When we consider several sections of the Missouri Constitution, we see a pattern requiring a public vote for financing of power plants.

1. RECITATION OF THE CONSTITUTIONAL SECTIONS THAT EITHER SET OUT THE GENERAL POLICY OR WHICH SET OUT THE SPECIFIC RULE REGARDING BONDS FOR POWER PLANTS.

MISSOURI CONSTITUTION, ARTICLE VI.

Section 23(a). Cities may acquire and furnish industrial plants — indebtedness for.

By vote of two-thirds of the qualified electors thereof voting thereon, any county, city or incorporated town or village in this state may become indebted for and may purchase, construct, extend or improve plants to be leased or otherwise disposed of …

(Adopted November 8, 1960) (Amended November 5, 1974)

***

Section 25. Limitation on use of credit and grant of public funds by local governments — pensions and retirement plans for employees of certain cities and counties.

No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees . . .

Source: Const. of 1875, Art. IV, §§ 47, 47a, 48a, (amended November 2, 1948).

***

Section 26(e). Additional indebtedness of cities for municipally owned water and light plants — limitations.

Any city, by vote of the qualified electors thereof voting thereon, may incur an ndebtedness in an amount not to exceed an additional ten percent of the value of the taxable tangible property shown as provided in section 26(b), for the purpose of paying all or any part of the cost of purchasing or constructing waterworks, electric or other light plants to be owned exclusively by the city . . .

Source: Const. of 1875, Art. X, §§ 12, 12a (as adopted Nov. 2, 1920).

(Amended August 2, 1988)

***

Section 27. Political subdivision revenue bonds for utility, industrial and airport purposes — restrictions. —[1]

Any city or incorporated town or village in this state, by vote of a majority of the qualified electors thereof voting thereon, and any joint board or commission, established by a joint contract between municipalities or political subdivisions in this state, by compliance with then applicable requirements of law, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, construction, extending or improving any of the following projects:

(1) Revenue producing water, sewer, gas or electric light works, heating or power plants;

(2) Plants to be leased or otherwise disposed of pursuant to law to private persons or corporations for manufacturing and industrial development purposes, including the real estate, buildings, fixtures and machinery; or

(3) Airports. The project shall be owned by the municipality or by the cooperating municipalities or political subdivisions or the joint board or commission, either exclusively or jointly or by participation with cooperatives or municipally owned or public utilities, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the municipality or by the cooperating municipalities or political subdivisions or the joint board or

[1] Copies of 27, 27(a) and 27(b) are also found in the Appendix, at A-6.

commission from the operation of the utility or the lease or operation of the project. The bonds shall not constitute an indebtedness of the state, or of any political subdivision thereof, and neither the full faith and credit nor the taxing power of the state or of any political subdivision thereof is pledged to the payment of or the interest on such bonds. Nothing in this section shall affect the ability of the public service commission to regulate investor-owned utilities.

(Amended November 8, 1960) (Amended August 17, 1965) (Amended November 5, 1974) (Amended November 7, 1978) (Amended November 4, 1986) (Amended November 3, 1998)(Amended 2002)

***

Section 27(a). Political subdivision revenue bonds issued for utilities and airports, restrictions.

Any county, city or incorporated town or village in this state, by vote of a majority of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any of the following: (1) revenue producing water, gas or electric light works, heating or power plants; or (2) airports; to be owned exclusively by the county, city or incorporated town or village, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the county, city or incorporated town or village from the operation of the utility or airport.

(Adopted November 7, 1978)

***

Section 27(b). Political subdivision revenue bonds issued for industrial development, restriction.

Any county, city or incorporated town or village in this state, by a majority vote of the governing body thereof, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any facility to be leased or otherwise disposed of pursuant to law to private persons or corporations for manufacturing, commercial, warehousing and industrial development purposes, including the real estate, buildings, fixtures and machinery. The cost of operation and maintenance and the principal and interest of the bonds shall be payable solely from the revenues derived by the county, city, or incorporated town or village from the lease or other disposal of the facility.

(Adopted November 7, 1978)

***

(All emphasis above and throughout this brief has been added.)

2. ARTICLE VI SECTION 27 REQUIRES A VOTE OF THE PEOPLE (AND IN THE ALTERNATIVE, 27(a) REQUIRES A VOTE OF THE PEOPLE).

Sections 25, 26(e), 27, and 27(a) of Article VI place restrictions on the ability of the General Assembly by statute to authorize cities to issue and sell different kinds of

bonds for power plants. Under these sections, decisions regarding bonds for power plants must be submitted to the people.

Sections 27 is the most pertinent section for our case. If we strip out from Section 27 all the language which does not apply to our case, Section 27 says:

> Section 27. Political subdivision revenue bonds for utility …
>
> purposes — restrictions. —
>
> **Any city** … by vote of a majority of the qualified electors … may issue … revenue bonds for the purpose of paying all or part of the cost of purchasing, construction, extending or improving any of the following: … (1) . . . electric light works … or **power plants** … (2) **plants to be leased** or otherwise disposed of pursuant to law to private persons or corporations for manufacturing and industrial development purposes … The project shall be owned by **the municipality** or by the cooperating municipalities or political subdivisions or the joint board or commission, either **exclusively or jointly or by participation with cooperatives or municipally owned or public utilities**, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the municipality or by the cooperating municipalities or political subdivisions or the joint board or commission from the operation of the utility or the **lease or operation** of the project.

Therefore, any city by a vote of the electors may sell revenue bonds for the purchase or construction of power plants.

The Trial Court did not apply Section 27. The Trial Court's Judgment (written by counsel for Defendant) stated that Section 27 did not apply

> "*because the project is not owned exclusively or jointly by one or more cooperating municipalities or a joint commission formed by cooperating municipalities.*" Legal File 35, paragraph 3.

The Trial Court's Judgment stated that 27(a) did not apply

> "*because the project is not owned exclusively by the Defendant City."* Legal File 35, paragraph 3.

First of all, it is difficult to fully understand the rationale of the Judgment when it says "the project is not owned exclusively or jointly by <u>one</u> or more municipalities…" In the present case, "one municipality" proposes to issue revenue bonds. The one municipality entered into a participation agreement with the utility, Aquila. In our view, Section 27 says that the bonds can be sponsored by a single city and the project can be owned by a single city in participation with a public utility.

The decision of the Trial Court appeared to pose the wrong question. It appeared to pose the question of "how can we avoid the application of Sections 27 and 27(a) so we don't have to have a public vote." Instead, the questions should have been, first, do Sections 27 and/or 27(a) apply, second, if so, what do they authorize the city to do, and third, what vote requirement is imposed? The answers are, first, the Constitution in Section 27 and/or 27(a) do apply because this is a matter involving a <u>power</u> <u>plant</u>, second, the bonds can be issued by a single city or by some kind of combination as set out in

Section 27 or as set out in Section 27(a), with the project's ownership being as is set out in 27 or 27(a), and, third, there must first be a vote of the public before the city or cities can issue revenue bonds.

Section 27 is written to apply to various situations, and not just to the situation where there is a venture involving more than one city or a joint commission.

In reviewing Section 27, we see that:

1.) the sponsor that issues the bonds can be "**any city**" with a public vote (singular), and the sponsor(s) can **also** be more than one city with a public vote,

2.) the object can be power plants, or plants to be leased,

3.) the manner of ownership can be "by **the municipality**" (singular),

4.) the manner of ownership can be by **participation** with a public utility (that is, it can be **one city** in participation with one public utility),

5.) the revenues can be received "by **the municipality**" (singular).

In four different clauses there is evidence of the intent that a single city can issue the bonds (with a vote).

In the first portion of Sections 27 it addresses the question of who can sponsor a revenue bond (that is, what entity or entities can issue revenue bonds). Subsequent language in Section 27 addresses the question of how the project is to be owned and how the money is handled. The fact that ownership of the project can be by one city alone, or

by one city in participation with a utility, reinforces the idea that the bonds can be issued by one city alone.

The language in 27 covers about every conceivable sponsorship and about every conceivable ownership, and these combinations can be mixed and matched. Sponsorship can be by a single city or by multiple cities or by cities in connection with other entities. The intent is that almost any conceivable alternative is covered by Section 27 (sponsorship by one or more, ownership by one or more, ownership can be joint, ownership can be exclusive, ownership can be in cooperation with a utility). Section 27 is a kaleidoscope of shifting and changing events. It thereby covers the gamut.

Before 1978, Section 27 only applied to single city ventures. It seems likely that the primary reason that Section 27 was amended in 1978 was to expand it so that it would also apply to multiple city ventures and ventures of one or more cities in connection with utilities or different kinds of entities. It would make sense that as various different ideas for financing were arising, society responded by modifying Section 27 to cover different possible arrangements. However, there is no reason to believe that the drafters of the current version of Section 27 intended that it would not thereafter apply to a single city venture or ventures between a single city and a utility.

We must remember that Section 27 both grants powers and imposes limits. It set out what can be done, and plainly places the power in the people, not in the alderman. It is illogical to say that the purpose of the amendment in 1978 was to eliminate application to a single city.

In interpreting 27, 27(a) and 27(b), we must keep in mind that the Senate and the House of Representatives each placed proposals on the ballot in 1978, and the public in a

general election passed both proposals. Section 27 was one of the proposals. Sections 27(a), (b) and (c) comprised the other proposal. A different version of Section 27 was previously in existence.[2] Sections 27(a) and 27 (b) were new proposals. In the general election, Section 27 received the most votes. However, since both proposals passed, if there is any ambiguity, we must attempt to read the sections together and attempt to resolve any ambiguity. We must try to give meaning to all the words in Sections 27, 27(a) and 27(b). State ex inf. Ashcroft ex rel. Bell v. City of Fulton, 642 S.W.2d 617 (Mo. 1982).

There does not appear to be any ambiguity, as applied to our case. Sections 27 and Section 27(a) both refer to "power plants," "electric light works," and "utilities." By comparison, Section 27(b) does not in any way refer to power plants, electric light works or utilities.

It is apparent that the drafters drew a distinction between things such as power plants, electric light works and airports, on the one hand (which we may call "utilities" for simplicity), which would definitely require a vote of the people, and commercial or industrial developments, which are not utilities, on the other hand (which we may call "developments"), which would not necessarily require a vote of the people. This distinction is also seen when we look at the other Constitutional Sections quoted above (Sections 23[a] and 26[e]). A difference between utilities and developments is established in the law.

[2] According to the "Historical Notes" in V.A.M.S., Section 27, when first adopted in 1945, required a four-sevenths vote of the public.

Why the distinction between utilities and areas for "development"? With utilities, these items are probably always a nuisance to someone, while with developments the area may or may not be a nuisance. There is a difference between putting a power plant next to my house without voters having a say in it and putting an office building next to me without voters having a say in it. The office building may not be a problem. The power plant definitely is a problem as it produces a considerable amount of pollution and noise and has high voltage lines.

Perhaps another distinction is, with utilities, the facilities are likely operated by a company which has a quasi-monopoly, while with developments the facilities are likely operated by a company which has no monopoly. A grant to a utility may open the door to a monopoly power in the territory. We should be careful with monopoly power.

Considering that the same people wrote 27(a) and 27(b), it is apparent that they must have meant to cover different matters in each section. 27(a) expressly applies to power plants. 27(b) expressly applies to other things. Expressio unius est exclusio alterius. We must conclude that 27(a) does not apply to the things covered by 27(b), and 27(b) does not apply to the things covered by 27(a). Therefore, power plants are not covered by 27(b).

Section 27 also applies to "plants to be leased." The Judgment of the Trial Court said that the plant will be leased to Aquila. Legal File 34, paragraph 18, Appendix A-3. Then the Trial Court's Judgment calls the facility a "commercial project," and applies 27(b). Legal File 36, paragraph 4, Appendix A-5. By this use of language, the Court ignored the very specific language of 27 and 27(a) that applied to both "power plants" and "plants to be leased."

If there were no Section 27, and we had only 27(a) to rely on, we would turn to the question of whether the Trial Court erred in holding that Section 27(a) does not apply because it refers to a project owned "exclusively" by the City. This begs the question of what is meant by saying "owned exclusively." In the present case, the Trial Court held that the City would in fact have legal title to the property. Legal File 34, paragraph 17, Appendix A-3. We can say that a lessor owns property exclusively even when the property is leased. (See discussion that next follows.)

3. IN WRING V. CITY OF JEFFERSON THE SUPREME COURT GAVE US GUIDANCE AS TO THE USE OF THE WORD "EXCLUSIVELY" AND EXPLAINED THE PUBLIC POLICY INVOLVED WITH REVENUE BONDS.

The Missouri Supreme Court did not appear to place any emphasis on the word "exclusively" in the case of Wring v. City of Jefferson, 413 S.W.2d 292 (Mo. Banc 1967). In Wring, the revenue bonds were approved by public vote. In Wring the Supreme Court talked about the protections that are afforded to the city by following Article VI Section 27 of the Constitution.

Jefferson City proposed an industrial plant to be leased to Interco, with Interco building it and operating it, and with the plant then be sold for a nominal sum to Interco. It was a shoe factory. The city said Section 27 authorized this.

After the public approved the proposal by a vote of 2732 to 86, the city entered into the agreement to lease the facility with an option to buy. The plaintiffs alleged the city was not authorized to sell the plant to Interco and that the city had to comply with competitive bidding requirements.

The Court set out the then-applicable version of Article VI Section 27 in full in the decision:

> "Section 27. Any city or incorporated town or village in this state, by vote of four-sevenths of the qualified electors thereof voting thereon, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any of the following: (1) revenue producing water, gas or electric light works, heating or power plants; [(2) plants to be leased or otherwise disposed of pursuant to law to private persons or corporations for manufacturing and industrial development purposes, including the real estate, buildings, fixtures and machinery;] or (3) airports; to be owned exclusively by the municipality, the cost of operation and maintenance and the principal and interest of the bonds to be payable solely from the revenues derived by the municipality from the operation of the utility [or the lease of the plant.]"

(The brackets denote what had been added to Section 27 before the facts arose. The italics and the brackets are contained in the Court opinion.)

Our review indicates that portions of the above version of Section 27 that were causing tension in Wring were the following:

> Any city … may issue … revenue bonds … for … plants to be leased or otherwise disposed of pursuant to law …
>
> … to be owned exclusively by the municipality …
>
> … the cost … to be payable solely from the revenues … or the lease…

The tension is obvious. How can the city own the plant "exclusively" and yet not comply with competitive bidding requirements? How can we say the city owns the project exclusively when it leases or otherwise disposes of the project? Is it enough for the city to only own the real estate exclusively for a brief moment? How can the city be immune from all liability, if the city is also called the exclusive owner?

The Supreme Court majority opinion never used the term "owned exclusively" again after quoting it on page 295, but it was like an elephant in the room that no one would mention.

Exactly as is planned in our case, the city took title, then leased the facility to the corporation, the corporation took all responsibility (including building everything), the

corporation was to operate it, and then at the end of a term the city would sell the facility to the corporation. Wring therefore gives us a considerable amount of guidance.

The Court appeared to indicate that while the city was the owner of the title it did not have much equitable ownership.

The obvious question then would arise, if the city is not equitable owner, how can the Court reconcile this with the requirement then found in 27 that the city be the exclusive owner?

In Wring it appeared the Court had no qualms about avoiding or limiting the requirement that the project be "exclusively owned." Apparently, it depends on how you define the term "exclusive ownership." The Court did not say how it defined the term, but however it did, it was no impediment. However, it only had a few choices of definitions. Either a.) the Court defined exclusive ownership so that only a brief moment in time of exclusive ownership was required, or b.) the Court defined it so that if you have the fee interest in the realty, even if someone else has equitable rights, you still have exclusive ownership, or c.) the Court defined it to only mean that the city was not owning the fee "jointly" with another city.

Since then, of course, the language of 27 has been greatly expanded so it now also expressly applies to arrangements in which the city's interest in a project is through some kind of "participation" with a "public utility." Exclusivity is no longer required in 27. It is now an alternative. A review of the current version of Section 27 leads us to believe that

in the current version, the word "exclusive" only means "not jointly."[3] Clearly, exclusive ownership by the city is no longer an issue in the application of Section 27.

The term "exclusively" is, however, in Section 27(a). After Wring, the word "exclusively" is such that a city can merely have title, lease the facility, have the lessee build everything, have the lessee assume all responsibility, and then sell the facility to the lessee for a nominal price at the end. Those were the facts in Wring.

The Supreme Court in Wring said the city was a "sponsor." Necessarily, the Court must have concluded that the city can still at the same time be called "exclusive owner." How can we read the "exclusive ownership" provision this way? The Court explained much of its thinking. It said the intention of Section 27 revenue bonds was that the city issues the bonds, but the city must have absolutely no obligation.

How can a city be "exclusive owner" and at the same time have absolutely no obligation? Presumably, anytime you are exclusive owner, you might have landowner liability and liability for your agents.

"Exclusive ownership" and "absolute immunity from liability" are at odds. The Supreme Court had to pick one over the other. It did. It ruled in favor of absolute immunity. By deed, if not by word, the requirement of exclusive ownership was defined so that it is virtually meaningless.

However, the only way to have the full immunity is to have a vote of the people. The full explanation garnered from a careful reading of the dissent and the majority is as follows.

---

[3] Reading Section 27, we doubt the drafters thought someone would say that there is ground between that which is "exclusive" and that which is "joint."

First of all, the basic idea of revenue bonds is that the city has no obligation, because if there was any obligation, we could not safely say that no payment will ever come from any source other than the revenues. The Court clarified the concept of no liability to the point that there would be no monetary obligation of any kind on the part of the city. This meant in that case there would be no obligation to seek competitive bids.

To have such a rule, which deviates from common law, you likely need to have a constitutional provision to follow, and to gain the benefit of "no involvement and no obligation," you have to follow the entire procedure set out in the Constitution, which requires a vote of the people. The dissent said:

> If, as the majority holds, revenue bonds are incompatible with direct contracting by the city, and if the city risks violation by such procedure of constitutional limitations on debt**, or at least risks general obligation when not authorized by the people** . . . (431 S.W.2d at 310, emphasis added).

A careful review shows what the dissent meant. If you are going to abide by this new rule, then you have to follow all the procedures set out in the Constitution. You don't cut corners. The primary requirement is a vote of the people. If you don't put it to a vote of the people, then you can't qualify for the unique rule of "no involvement and no liability." On the other hand, if the City of Peculiar acts outside constitutional authority, then the city could possibly be liable on this $140,000,000 venture, and the taxpayers of course will be the ones who have to pay.

The majority opinion touched on the idea that all the constitutional requirements had to be met, at page 299, when it said that:

> "**all the constitutional and statutory provisions meticulously guard against the municipalities incurring any personal liability or obligation** . . . " (Emphasis added.)

and when at page 300 it added:

> (Quoting with approval from a prior case about Section 27) "On the contrary its very terms are that any city, **upon a prescribed vote**, 'may issue and sell,' etc. We think the language so plain, and its intent so evident that it must be held to directly confer upon the city the authority to issue and sell such revenue bonds as are here under scrutiny '**by vote** of four-sevenths of the qualified electors thereof voting thereon.' " (Emphasis added.) ***

To carry out the intention that a city can issue revenue bonds but avoid all liability, that bothersome term ("exclusive ownership") has to be given a "special meaning." In other words, that term has to be rendered virtually meaningless.

After Wring, there is no doubt that a city could be considered an exclusive owner even if the city is only the owner of legal title with absolutely no obligations, in a revenue bond situation, and even though the city will immediately enter into a lease with option to purchase in which equitable rights are bestowed on the lessee. Wring called this "sponsorship." Wring can be read no other way but to define "exclusive ownership" down to virtually nothing.

If the Court looks to 27(a), does it use the apparent interpretation of Wring? Yes. 27(a) was enacted in 1978. Where the Legislature, after a statute has been interpreted by a court of last resort, reenacts or carries forward without change the exact language theretofore construed, it is presumed that it knew of and adopted the judicial

construction previously given to the statute. Roy F. Stamm Electric Co. v. Hamilton-Brown Shoe Co., 350 Mo. 1178, 1184, 171 S.W.2d 580 (Mo. banc 1943).

After Wring, if the Supreme Court were faced with our case, we would fully expect the Court to say that a.) Peculiar has a contract with Aquila that is identical to that between the city and Interco in Wring, and b.) Peculiar can at the same time be considered to be both an exclusive owner (for purposes of 27[a]) and a sponsor.

In the Wring case, the proposal for a revenue bond was put to a public vote, and was approved by a vote of the people. Of course Wring cannot stand for the proposition that no public vote is needed.

In our case, the City proposes to finance the building of a power plant in a residential area just outside of the city limits, to the tune of $140,000,000, a major undertaking for a fourth class city, over the objections of the people, with the power plant to service much of the greater metropolitan area of Kansas City and north to the St. Joseph area. In other words, the City wants to stick a big nuisance in this neighborhood just outside the city limits and to issue bonds without any people having any vote on the matter.

We see that the intent also is found in Article VI Sections 23(a) and 26(e) that financing for a power plant must be submitted to a vote of the people. These sections deal with general obligation bonds, but still they indicate a consistent intent to submit such matters financing of power plants to the will of the people.

In Section 25, we see the general principal that the public money must not be used to benefit a company, unless it is authorized by the Constitution. This is an over-arcing principle. The Board of Alderman proposes to help a private company, Aquila, with financing in two ways. First, to issue the revenue bonds. Second, to "agree" that the

project shall be free from city and county and school district taxes. The City can only give such great help to Aquila in this way if it is authorized by the Constitution. It is not so authorized.

Several Sections in our Constitution require a vote of the people for financing of a power plant. By contrast, one lone section of the Constitution, 27(b), fails to say that a vote of the people is required. 27(b) is inapplicable to our case because:

1.) 27(b) does not refer to power plants;

2.) 27(b) does not refer to electric light works;

3.) 27(b) does not refer to utilities;

4.) 27(b) instead refers to "developments."

Section 27(b) does not apply. You don't lease or otherwise convey facilities to a utility for "development." No office parks are going to spring up next to a power plant. Aquila is not a developer. By "development," you mean that you want to entice numerous businesses to rent space in the development area. You do not develop by starting off with a polluting power plant, with substations and high voltage lines.

Accordingly, the most important point involved in our constitutional analysis is the fact that the facility is a power plant.

4. OTHER STATUTES THAT DEAL WITH POWER PLANTS AND ELECTRIC WORKS REQUIRE A PUBLIC VOTE.

RSMO 88.770 specifically deals with fourth class cities. This section states that before the City can contract for electrical service and/or grant the right to someone to erect

works, it must submit the question to a vote of the people. The pertinent sections about the requirement of a majority vote are as follows:

88.770 Street lighting system — electric or gas works (fourth class cities). —

> 1. *** The board of alderman may . . . grant the right to any person . . . to erect such works *** Such rights may not extend for a longer period than twenty years *** **Every initial grant shall be approved by a majority of the voters** . . . **and each renewal or extension of such rights shall be subject to voter approval of the majority of the voters** *** (Emphasis added.)

While RSMO 88.770 does not deal with the question of issuance of revenue bonds, it is very important to note that the statute requires a vote of the people before the City can even enter into a contract for provision of electrical service, and before it can grant to any company the right to erect electric light works, and before it can extend or renews any rights.

The City in our case proposes to finance a power plant. This necessarily will involve two or more of the following concepts:

1.) "erecting" electric works,

2.) entering into a contract with Aquila,

3.) granting rights to Aquila,

4.) "extending" rights (if rights already are in existence).

If at least one of the above is to be at issue, under 87.770, this fourth class city must submit the issue to a vote of the people.

Reading further in RSMO 88.770, we see it contains a broadly worded clause that states that before a fourth class city may sell, convey, encumber, lease or otherwise dispose of any part of any public utility assets, the matter must first be put to a vote of the people, and must be approved by a two-thirds vote of the people. The pertinent portion of this statute reads:

> Street lighting system — electric or gas works (fourth class cities). —
>
> … the board of aldermen **may sell, convey, encumber, lease, abolish or otherwise dispose of any public utilities owned by the city** including electric light systems, electric distribution systems or transmission lines, **or any part** of the electric light systems, electric or other heat systems, electric or other power systems, electric or other railways, gas plants, telephone systems, telegraph systems, transportation systems of any kind, waterworks, equipments **and all public utilities not herein enumerated** and everything acquired, after first having passed an ordinance setting forth the terms of the sale, conveyance or encumbrance and **when ratified by two-thirds of the voters** voting on the question. (Emphasis added.)

The City proposes to a.) promptly encumber all or part of the assets in order to sell bonds, b.) to promptly lease assets to Aquila, and c.) **to eventually sell all the assets to Aquila for $1,000**. A fourth class city cannot do any of these things without first getting a two-thirds vote of the public, as required by 88.770. However, this was ignored by the Trial Court, even though it was pointed out in the brief of Plaintiffs/Appellants.

If nothing else, this section is further evidence of the public policy of the State that envisions a vote of the public for matters involving electric works. If nothing else, this

section means the City cannot encumber, lease or transfer the property without a public vote.

Let us consider also RSMO 71.530, which deals with all municipalities. That section states in pertinent part:

> Municipalities may contract for utilities — approval by majority of voters required, when. —
>
> Any city, town or village may contract with any corporation organized under the laws of Missouri … for the purpose of supplying it with gas, electricity or water. *** Each contract may be renewed for another period or periods for a term of not more than twenty years per period. *** All renewal contracts entered into under the provisions of this section shall be subject to voter approval of the majority of the voters voting on the question, pursuant to the provisions of section 88.251, RSMo. Every initial contract for such services shall be approved by a majority of the voters of the municipality ***

Under 77.530, every initial contract for the provision of electricity and every renewal contract must be approved by a majority vote of the people. At least this sets forth a general policy that before cities enter into arrangements with electric utilities, there must be a vote of the people.

We can sum up by saying that our laws prescribe that, with a fourth class city, all of the following matters can only be done after a vote of the people:

1.) the provision of utility services,

2.) the erection of utilities works,

3.) the financing by general obligation bonds for utilities,

4.) the financing by revenue bonds for utilities,

5.) the granting of rights to companies regarding utilities,

6.) the mortgage of any utility property, and/or

7.) the sale, lease or conveyance of any utility property.

The law may not be as artfully written as it should be in places, but there certainly is a pattern. This pattern sets forth a solid public policy. That is, with power plants, the law requires that the matter first be submitted to a vote of the people.

5. IT IS A POWER PLANT, NOT A COMMERCIAL DEVELOPMENT OR INDUSTRIAL DEVELOPMENT.

The Judgment of the Trial Court speaks of the power plant as if it were not a "power plant" but rather a "commercial development." We submit that our lawmakers did not intend to include the notion of a power plant within the definition of the terms "commercial development" and "industrial development."

RSMO Chapter 349 was enacted in 1977. Article VI Section 27(a) and (b) were enacted in 1978. All of these provisions were apparently drafted by members of the General Assembly. Chapter 349 is entitled "Industrial Development Corporations." It authorizes industrial revenue bonds to be issued by industrial revenue corporations. This chapter makes a definite distinction between utility operations and industrial development projects:

349.010. Definitions. — ***

(4) "Project" means the purchase, construction, extension and improvement of plants, buildings. . . . Excluded are facilities designed for the sale or distribution to

the public of electricity, gas, water or telephone, together with any other facilities for cable television and those commonly classified as public utilities. *** (Emphasis added.)

The important language in the definitions, above, is that which defines industrial development "projects" because it specifically says that this definition does not include:

… facilities designed for the sale or distribution to the public of **electricity …**

We submit that same interpretation of these words carries forward in the Statutes and Constitutional provisions regarding power plants and bonds. That is, there is a difference between utilities and other projects.

RSMO Chapter 100 is entitled "Industrial Development." The definition of "project for industrial development" found at 100.010(5) does not in any way mention a utility or power plant. If the Court were to apply Chapter 100 to our case, then the Court must conclude that Section 27 and 27(a) nonetheless impose a Constitutional requirement that there must be a vote of the people for issuance of revenue bonds for power plants.

In Webster's Fifth Edition, "commercial" is defined as:

"Of or pertaining to commerce; mercantile; as commercial house; having financial profit as the primary aim . . . Syn., commercial suggests the larger aspects of the operations of exchange; mercantile, the actual buying and selling of commodities."

The definition of "development" refers to the process of growing. The normal usage of the phrase "commercial development" indicates something quite different than a "power plant." If you review "commercial development" and "public utility" in any work on language, you will find the first generally envisions the growth of an area for buying and selling goods and services to the general public while the second envisions a facility that supplies electricity or some other power.

The argument contain in pages 19 through 31, above, is incorporated herein by reference. As shown therein, the Constitution makes a distinction between utilities and developments. It is a power plant. Even the Judgment calls it a power plant. See Judgment, Appendix A-3, paragraph 17.

D. THE POWER OF THE CITY IS LIMITED TO WHAT THE LEGISLATURE CAN AND DOES EXPRESSLY AUTHORIZE.

In City of Kansas City v. Fishman, 362 Mo. 352 (Mo. 1951), 241 S.W.2d 377, the Court dealt with a former version of Article VI, Section 27. The Court said the following:

> Thus this constitutional provision (Article VI, Section 27) prohibits the Legislature from authorizing revenue bonds, for the purpose of paying for municipally owned water, gas or electric light works, heating or power plants or airports, which are not approved by vote of four-sevenths of the qualified electors. (Emphasis added.)

The importance of Fishman is that it says the Legislature cannot enact a statute that would allow a City to issue revenue bonds under Section 27 without a vote of the people.

If we return to the discussion of RSMO Chapter 100, we see that under Fishman the Court has no choice but to conclude that Chapter 100 simply cannot be read to allow the City to issue revenue bonds for power plants without a vote of the people.

In Ex Parte Keane v. Strodtman, 323 Mo. 161, 18 S.W.2d 896 (Mo. Banc 1929), the Court said that:

> … where . . .the statute limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be done otherwise. *** (Also see) Dougherty v. Excelsior Springs, 110 Mo. App. 623, 626, 85 S.W. 112, to this effect "that when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power, this brings the exercise of such power within the provision of the maxim expressio unius, etc., and by necessary implication forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.

In Sections 27, 27(a), and 26(e) of Article VI, the Constitution sets out precisely how a municipality may have the power to issue bonds for a power plant. Expressio unius. Any other method is not authorized. The only way to issue bonds for a power plant is by following 27, 27(a) or 26(e). A public vote is the common requirement of all.

In Fidler v. Personnel Committe, 766 S.W.2d 158 (Mo.App. 1989), the Court said:

> …cities can exercise only such powers as are expressly or impliedly conferred upon them and, in the event the power is doubtful, it must be construed as not having

been granted. In the case of Tietjens v. City of St. Louis, 359 Mo. 439, 444-45, 222 S.W.2d 70, 73 (banc 1949), the court noted that the state retains control to a great extent over the governmental functions of a city and to exercise a power, **the city must find a specific delegation of the power from the state or an implied grant of that power**. (Emphasis added.)

A fourth class city only has such powers as are conferred upon it by the state. City of Republic v. Smith, 139 S.W.2d 929 (Mo. Banc 1940).

If it is doubtful that the power has been given to the City, then it must be construed that the power is not given to the City. In our case, the Constitution does not give the City the power to issue these bonds for a power plant without a public vote. In fact, the Constitution requires that for power plants the proposal must be submitted to the general public for a vote.

If there are conflicting sections of law, then the authority for the City may be "doubtful." If it is doubtful, then the Court must say the power was not granted to the City. Fidler, supra.

The Judgment seems to take the erroneous view that the City can do something unless the Constitution expressly prohibits it. The correct view is that the City does not have the power to issue revenue bonds unless it is expressly allowed by law, and that when the Constitution addresses the matter of bonds for power plants, and sets out how the City may issue revenue bonds for such, the City must follow the requirements set out therein.

The power to issue revenue bonds for a power plant resides in the people. Any action of the City to issue these bonds by only a vote of the Alderman is void. The Trial

Court's Judgment should be reversed. The Court of Appeals should direct that the Trial Court enter Judgment declaring that a vote of the public is necessary for the issuance of revenue bonds for this power plant. In addition, the Court of Appeals should order that an appropriate injunction be issued to stop further action that is to be or has been undertaken without a vote and/or to undo what has been done.

POINT II.

THE TRIAL COURT ERRED IN ISSUING A FINDING THAT DECLARED THAT THE PROJECT WAS FREE FROM TAXATION BY THE COUNTY AND BY OTHER TAXING AUTHORITIES BECAUSE THE FINDING ERRONEOUSLY DECLARED THE LAW, IN THAT AQUILA IS TO HAVE A LEASEHOLD INTEREST IN THE PROPERTY AND SUCH IS NOT EXEMPT FROM TAXATION, AND IN THAT NO PARTY ASKED FOR THIS IN ITS PRAYER, AND IN THAT THE OTHER TAXING AUTHORITIES WERE NOT PARTIES TO THIS LITIGATION AND CANNOT BE BOUND BY THIS JUDGMENT.

A. STANDARD OF REVIEW.

The Appellants in point II assert that the standard of review is that set out in Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976), and that the decision of the Trial Court erroneously declared the law, erroneously applied the law, and/or is against the weight of

the evidence. Appellants further assert that the factual finding in the Judgment should be considered by the Court under the Plain Error Rule.

B. THE LEASEHOLD INTEREST OF AQUILA WILL NOT BE FREE FROM TAXATION.

At paragraph number 21 of the Trial Court's Findings, it says the project will be free from city and county property tax and also free from property tax imposed by school districts and other authorities. Legal File 35, Appendix A-4, paragraph 21. This was not requested by any party in any prayer in any pleadings. Legal File 1, 15. (This language first appeared in the proposed judgment submitted by the City, which was filed after the hearing, and the Court used the City's proposed judgment without change.)

It is important that this not stand. The City of Peculiar cannot by agreement with Aquila provided that other taxing authorities cannot impose property tax on a private company, Aquila. This is merely an agreement between Aquila and the City. Legal File 28 paragraph 26. The land on which the project is proposed is outside of the city limits. It is entirely in unincorporated Cass County. The City of Peculiar simply cannot provide that a power plant that sits in unincorporated Cass County is free from taxation by Cass County, by the school district, and by other authorities.

In Iron County v. State Tax Commission, 437 S.W.2d 665 (Mo banc 1968), the city had entered into a lease with Rubberoid . The city owned the land and Rubberoid leased the buildings, equipment and machinery. The State Tax Commission ruled that the leasehold interest held by Rubberoid could be taxed by the county. The Missouri Supreme Court agreed, ruling that the leasehold interest was in fact subject to taxation.

The project had been financed by revenue bonds, and the real estate was owned by the city, as will happen in our case, but nonetheless the leasehold interest held by the lessee was taxable. The Court indicated that all property is subject to taxation unless it is specifically exempt, and that while a governmental body may be exempt from taxation for the real estate it owns, this exemption does not extend to the leasehold interest of the tenant.

According to the Supreme Court in Iron County, the interest of the lessee in real estate is taxed as an interest in real estate.

In St. Charles County v. Curators of the U.M., 25 S.W.3d 159 (Mo.banc 2000), the county assessed the leasehold interests of entities that leased real estate from the university. The county sued, asking the court to invalidate RSMO 172.273, which stated that the property was exempt. The Supreme Court cited Iron County for the proposition that the tax exempt status of the governmental body (the land owner) does not extend to the holder of the leasehold interest. The Court said:

> The Constitution sets out the universe of property exempt from taxation. See Arsenal Credit Union v. Giles, 715 S.W.2d 918, 921-23 (Mo.banc 1986). **The Constitution voids any law that exempts property not enumerated in Article X. Mo. Const. art. X, section 6; Iron County, 437 S.W.2d at 668. Leaseholds in state property are not enumerated in Article X, section 6 of the Constitution.** ***
>
> Property which, in fact, does not belong to the state, cannot be made state property by legislative declaration. Neither can the Legislature exempt property from taxation

> by declaring that such property, for the purpose of taxation, shall be deemed state property, when in fact it is not state property. (Emphasis added.)

The Supreme Court in St. Charles County held that the leasehold interest could be taxed by the county, despite what the Legislature had attempted to do. The primary reason why the interest was taxable was because under the Missouri Constitution, Article X, Section 6, no property can be exempt from taxation unless it is exempted in Article X, Section 6.

The interest of Aquila is not an interest that is enumerated in Article X, Section 6 as one being free from taxation. Because "the Constitution voids any law that exempts property not enumerated in Article X. Mo. Const. art. X, section 6," the city cannot by agreement exempt the leasehold interest of Aquila from taxation by the county or others.

Under the language of the Trial Court's Findings of Fact, it would appear there would be no property taxation, even by taxing authorities that were not parties to this litigation, and even though the City did not ask for this in its prayer. Under Iron County and St. Charles County, supra, this is an erroneous statement of the law by the Trial Court that must be corrected.

Appellants have an interest in Aquila paying its county taxes, school district taxes and other taxes. This is a significant controversy. Since the project reportedly will cost approximately $140,000,000 to build, the property tax could be substantial. No doubt, due to the language found in the Trial Court's Judgment, the City and Aquila will in the future take the position that Aquila is exempt from county taxes and the taxes of other authorities.

It is stipulated that the projection is that Aquila would save over $17,000,000 in taxes if the project is handled as provided in their "agreement." See Legal File 28-29, paragraph 27. If this arrangement results in Aquila avoiding $17,000,000 in taxes, that tax loss will likely have to be made up somewhere else, through increased taxes on others, and the individual members who comprise StopAquila.org will be included in that group of people who will have to make up the shortfall.

CONCLUSION

To review briefly:

1.) The City does not have power unless given to it by the Constitution or by constitutionally authorized statutes; if there is doubt, then the City does not have the power;

2.) The Constitution (Article VI Sections 27 and 27[a]) states that there shall be a vote of the people if the City wants to issue revenue bonds for a power plant,

3.) The Statutes and the Constitution draw a distinction between power plants, on the one hand, and industrial development and commercial development, on the other hand, and provide more protections for the people in matters involving power plants,

4.) The extra protection afforded the people when it comes to power plants is expressed in various provisions of law that reserve in the people the power to vote for or against such propositions,

5.) Article VI Section 27(b) does not address power plants,

6.) RSMO Chapter 100 does not address power plants,

7.) RSMO 88.770 limits the power of fourth class cities, requiring a majority vote of the people for the city to grant rights to a company to erect works or for the city to contract with a utility, and further requiring a two-thirds vote of the people before the city can transfer an interest in utility property, and

8.) The Trial Court also plainly erred in stating that the project is free from property taxation by governmental authorities that were not parties to this litigation (and such cannot be exempted from taxation under Article X, Section 6).

The intent of the Constitution and the Statutes is clear. A vote of the people is necessary before the City issues revenue bonds for a power plant.

The Court of Appeals should reverse the Judgment of the Circuit Court and remand, ordering that the Circuit Court must also enter a mandatory injunction in favor of Appellants to prohibit the City of Peculiar from issuing revenue bonds for the Aquila power plant unless this is first approved by a vote of the public, ordering that RSMO 88.770 must be followed, ordering that if any revenue bonds have been issued in the interim, to the extent possible those bonds should be cancelled and money that has exchanged hands shall be returned, ordering that any transfers of property, including encumbrances, be enjoined and steps taken to return the property, and further ordering that the finding that stated that the property is free from property taxes must be stricken from the Judgment of the Trial Court.

Gerard D. Eftink MO Bar #28683
704 W. Foxwood Drive
P.O. Box 1280
Raymore, MO 64083
(816) 322-8000
(816) 322-8030 Facsimile
E-mail geftink@comcast.net
Attorney for Plaintiffs/Appellants

CERTIFICATION

I certify that the above has been checked and is free from viruses, and that the above contains 12,841 words.

On this _____ day of _____,
2005, a copy of the foregoing was sent by U.S. Mail postage prepaid to:

James Thompson
Crouch Spangler and Douglas
117 South Lexington
Harrisonville Mo 64701
Phone (816) 380-3238
Fax (816) 380-2976

and

E. Sid Douglas III
Gilmore & Bell, P.C.

Suite 1100
2405 Grand Blvd.
Kansas City, Missouri 64108
Phone (816) 221-1000
Fax (816) 221-1018

By _____